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8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA
 10 OAKLAND DIVISION

11 QIN CHEN,

12 Plaintiff,

13 v.

14 MICHAEL CHERTOFF, Secretary of Department)
 15 of Homeland Security; EMILIO T. GONZALEZ,)
 Director of the U.S. Citizenship and Immigration)
 16 Services; CHRISTINA POULOS, Acting Director)
 of USCIS, California Service Center; and)
 17 ROBERT S. MUELLER, Director of the Federal)
 Bureau of Investigation,)

18 Defendants.
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) No. C 07-2188 WDB
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) OPPOSITION TO PLAINTIFF'S MOTION
 FOR SUMMARY JUDGMENT
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20 As an initial matter, Defendants seek dismissal of Defendant Mueller. On March 1, 2003, the
 21 Department of Homeland Security and, under it, the U.S. Citizenship and Immigration Services
 22 ("USCIS"), assumed responsibility for the adjustment program. 6 U.S.C. § 271(b). Accordingly, the
 23 discretion formerly vested in the Attorney General is now vested in the Secretary of Homeland
 24 Security. 6 U.S.C. § 551(d). Plaintiff has not identified any statute or regulation establishing a
 25 nondiscretionary duty on the part of the FBI to process name checks for adjustment of status
 26 applications. *See Clayton v. Chertoff*, 2007 WL 2904049 at *3 (N.D. Cal. Oct.1, 2007). Instead, the
 27 FBI's involvement in adjudicating I-485 applications arises by contract between USCIS and the FBI.
 28 Accordingly, this Court has no jurisdiction to compel the FBI to complete the background check and

1 the claims against Defendant Mueller are dismissed. *Konchitsky v. Chertoff*, 2007 WL 2070325, at
2 *6 (N.D.Cal. Jul 13, 2007).

3 The Defendants recognize this Court's decision in *Razaq v. Poulos*, 2007 WL 61884, at *4 (N.D.
4 Cal. Jan. 8, 2007) ("Congress had to have intended the executive branch to complete these
5 'adjudications' within a reasonable time-because imposing no time constraint at all on the executive
6 branch would be tantamount to giving the government the power to decide whether it would decide....
7 A 'duty to decide' becomes no duty at all if it is accompanied by unchecked power to decide when to
8 decide."). In this case, however, Defendants have provided the declaration of F. Gerard Heinauer, the
9 Director of the Nebraska Service Center, who attests that he has reviewed the records regarding
10 Plaintiff's I-485 application, and that to date, required security checks have yet to be completed, which
11 prevents USCIS from adjudicating Plaintiff's application. (Heinauer Decl. ¶ 16.).

12 In addition, Defendants submitted the Declaration of Michael Cannon, Section Chief of the FBI's
13 National Name Check Program. Mr. Cannon explains that 68 percent of all USCIS-initiated name
14 checks are returned within 48-72 hours as having no record. (Cannon Decl. ¶ 13.) After the second
15 stage of the process is conducted, that percentage rises to an overall 90 percent "no response" rate.
16 (*Id.* ¶ 14.) Thus, the remaining 10 percent are identified as possibly being the subject of an FBI
17 record. (*Id.* ¶ 15.) At that point, the FBI record must be retrieved and reviewed, which may require
18 retrieving paper files. (*Id.*) Here, Plaintiff falls into the narrow class of individuals whose name
19 checks require more intense review. (*Id.* ¶ 41)

20 Thus, even accepting as true all of Plaintiff's factual allegations, Defendants have provided
21 sufficient evidence to demonstrate that any delay in adjudicating Plaintiff's I-485 application is not
22 due to agency inaction, but rather to the time required to resolve all concerns of a law enforcement or
23 national security nature. *Eldeeb v. Chertoff*, 2007 WL 2209231, at *5 (M.D. Fla. July 30, 2007).
24 Therefore, Plaintiff's suit simply seeks to force USCIS to complete the adjudication in a more
25 expeditious manner. As long as USCIS is making reasonable efforts to complete the adjudication, the
26 pace required to complete that process is committed to USCIS's discretion, and any delay is
27 reasonable.


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1 For the foregoing reasons, the Government respectfully asks the Court to dismiss Defendant
2 Mueller, and grant the remaining Defendants' motion for summary judgment as a matter of law.

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4 Dated: November 20, 2007

Respectfully submitted,

5 SCOTT N. SCHOOLS
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8 EDWARD A. OLSEN
9 Assistant United States Attorney
10 Attorney for Defendants
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the Office of the United States Attorney for the Northern District of California and is a person of such age and discretion to be competent to serve papers. The undersigned further certifies that she is causing a copy of the following:

OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Qin Chen v. Michael Chertoff, et al.
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to be served this date upon the party in this action by placing a true copy thereof in a sealed envelope, and served as follows:

☒ **FIRST CLASS MAIL** by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing U.S. mail in accordance with this office's practice.

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☐ **FACSIMILE (FAX)** Telephone No.: See Below

to the party(ies) addressed as follows:

Qin Chen
2246 Magnolia Bridge Drive
San Ramon, CA 94582

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on November 21, 2007 at San Francisco, California.

/s/

MANIK BOWIE
Legal Assistant